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POLITICAL COMMITTEE EXPENDITURES AND THE HATCH ACT

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COMMENTS

POLITICAL COMMITTEE EXPENDITURES AND THE HATCH ACT—Democratic governments are rightly concerned about how money is used to influence elections. The oft-quoted proverb, "He who pays the piper calls the tune," contains a large grain of truth. In many countries comprehensive statutory regulation of campaign expenditures may be found; but it is unlikely that any other country can match the variety of experiments which have been indulged in by the national Congress and the forty-eight state legislatures in the United States.

While there are many angles to the problem of regulating the use of money in elections this discussion is directed to the recent attempt by the federal government to regulate the size of contributions to and expenditures by national political committees. American political scientists have commonly asserted that it is the sources of political funds rather than their size which is of chief public concern. American legislators, while not ignoring the sources, have nevertheless chosen to give their main emphasis to the factor of size. Experience with recent legislation by the federal Congress highlights the difficulties involved in trying to regulate in this field.

In general there are two possible legislative approaches to the problem of size. One is the approach of *publicity*, involving enactment of

statutes providing an elaborate scheme for the reporting of receipts and expenditures and for subsequent publication of these details in such a prominent way as to illuminate the whole field of political finance. The underlying assumption of the publicity approach is that public opinion will effectively limit political expenditures to a reasonable size, since presumably an informed electorate will frown upon the "buying" of political support through "excessive" expenditures. The second approach is that of *ceiling limitations*, involving a determination by the legislative body of the maximum amount which may reasonably be spent by a political party or candidate to influence the electorate. Expenditure of a larger amount is then prohibited. Of course the two approaches may be used in combination.

The American Congress has only half-heartedly utilized the publicity approach. As early as 1910 it passed a statute requiring publicity of receipts and expenditures by political committees.[1] Although the publicity provisions were strengthened somewhat in 1912[2] those who have studied the matter, including congressional investigating committees, are unanimous in the opinion that the publicity provisions are so weak as merely to create the illusion of publicity. Specific criticisms have generally emphasized the lack of a single central office for the filing of reports of receipts and expenditures, the failure to vest in such an office power to develop uniform accounting forms and to prepare compilations of data on file so as to render the information filed intelligible to the public, and the utter unconcern of officials over failure to file at all or in a form in accordance with the legal requirements.

As Professor Overacker has well said, "Publicity of contributions as of expenditures—pitiless, continuous, and intelligent publicity, extending to nonparty as well as party organizations—is the least that a democracy should demand."[3] Yet, according to Dr. James K. Pollock, a leading student on this subject, "The statements that are filed . . . do not serve the purposes of publicity . . . the statements . . . are frequently unintelligible. There is little question but that they are sad commentaries on public accounting."[4] And the special committee of the United States Senate which thoroughly investigated 1936 election campaign expenditures reported: " . . . there is no accounting practice in the United States today which presents so many complexi-

[1] 36 Stat. L. 167 (1910).

[2] 37 Stat. L. 360 (1912).

[3] Quoted in "Report of the Special Committee to Investigate Presidential, Vice Presidential, and Senatorial Campaign Expenditures in 1944" (hereafter cited as "Green Committee Report"), S. REP. 101, 79th Cong., 1st sess., at p. 7.

[4] PARTY CAMPAIGN FUNDS 188 (1926).

ties arising from lack of uniformity and completeness as that of political organizations."[5]

Although the federal Congress had utilized ceiling limitations for candidates for the Senate and the House of Representatives since 1911[6] these had been rendered ineffective in part by obvious failure to cover the large sums spent indirectly on behalf of candidates and party tickets by political committees. Up to 1940 political committees had no other obligation than to report their receipts and expenditures under the inadequate publicity provisions previously described. In that year Congress embarked upon a program of regulation by direct ceiling limitation. Section 20 of the Hatch "Clean Politics" Act[7] provided that no political committee should henceforth receive contributions or make expenditures aggregating more than $3,000,000 in any calendar year.

By what process, either of reasoning or of legerdemain, the $3,000,000 figure was arrived at it has been impossible to ascertain. A careful examination of the printed debates on the Hatch Act in Congress and of the reports of the Senate and House committees to the Congress throws little light on the question. It is significant that the act as originally introduced by Senator Hatch contained no ceiling limitation provision. In fact, Senator Hatch at first opposed all amendments designed to put such limitations upon expenditure when presented on the floor of the Senate. It was in the House of Representatives that the $3,000,000 limitation was slipped into the bill, and the Senate was later compelled to concur. However the $3,000,000 figure was arrived at, it seems likely that it was the purpose of its proponents to reduce to that amount all expenditures on behalf of a particular national party ticket (whether these expenditures should be made through one political committee, or through several committees).[8]

The limitation was tested during the presidential elections of 1940 and 1944. It may be observed that the limitation has not reduced over-all political expenditures; at the same time it has materially impaired the effectiveness of the existing publicity provisions applying to political committees. A special Senate committee which studied the 1940 campaign reported: "The committee members are unani-

[5] "Report of the Special Committee to Investigate Campaign Expenditures of Presidential, Vice Presidential, and Senatorial Candidates in 1936," S. REP. 151, 75th Cong., 1st sess., at p. 136.

[6] 37 Stat. L. 25 (1911).

[7] 54 Stat. L. 772 (1940).

[8] Senator Hatch testified before a Senate committee that it was the intent of Congress to limit to $3,000,000 the *aggregate* collections and expenditures of *all* political committees supporting the same presidential candidate. See Louise Overacker, "Campaign Finance in the Presidential Election of 1940," 35 AM. POLI. SCI. REV. 701 at 705 (1941).

mously of the opinion that the limitations on expenditures for campaign purposes sought to be imposed by the provisions of the Hatch Act have been largely ineffective. . . . "[9] Its 1944 counterpart committee unanimously recommended removal of the $3,000,000 limitation, calling it "utterly unrealistic" and positively harmful.[10]

As indicated previously, a fundamental assumption of the ceiling limitation approach is that the legislative body has made a serious attempt to determine the maximum "reasonable" amount that may be properly collected or expended during a political campaign. If the figure is set too low it is an invitation to evasion. Any ceiling limitation figure necessarily represents a moral judgment. Its enforcement will depend in large measure on how it conforms to public opinion in the body politic. Since the use of money in connection with politicial campaigns is not an evil *per se*, the legislative body which chooses to set a ceiling limitation on its use undertakes a serious responsibility.

While it is difficult to determine precisely what would be a proper ceiling limitation there is no such difficulty in showing that the $3,000,000 figure was too low. In a country of some one hundred thirty odd millions of people living in a territory covering some three million odd square miles it is impossible to present a presidential candidate and supporting ticket for any such figure. In the words of the 1944 Senate investigating committee: "The extensive presentation of issues and candidates in a national campaign is basic to successful operation of the democratic process and necessarily requires expenditures of a sum greater than $3,000,000."[11]

That this is so is corroborated by comparison with the amounts spent by private advertisers of commercial products and with the amounts spent prior to 1940 by the national party committees of the two major parties. Thus, in the calendar year 1943, General Foods Sales Corporation spent approximately eleven and one-half million dollars for radio and press advertising; General Motors Corporation spent over nine million, and Proctor and Gamble spent over fifteen million.[12] If single business enterprises spend such amounts, surely expenditures approaching these are not too unreasonable when they are made for the legitimate purpose of informing the vast electorate on political issues and candidates. Indeed, one might question whether the enforcement of the $3,000,000 limitation as an over-all ceiling would not so

[9] "Report of the Special Committee to Investigate Presidential, Vice Presidential, and Senatorial Campaign Expenditures in 1940," S. REP. 47, 77th Cong., 1st sess., at p. 80.

[10] "Green Committee Report," S. REP. 101, 79th Cong., 1st sess., at p. 82.

[11] Id. at p. 79.

[12] See STANDARD ADVERTISING REGISTER, Product Edition for April, 1944, for these and other figures on commercial advertising budgets.

stifle discussion as to hinder the formation of an intelligent public opinion on these matters.

Moreover it is of some significance that prior to the adoption of the Hatch Act the official national party committees of the two major parties had in recent presidential election years often collected and spent more than $3,000,000. At the same time these committees had tended to monopolize the collection and expenditure of funds for support of the national party ticket. The Hatch Act was effective to the extent that the official national party committees were limited to receipts and expenditures of $3,000,000,[13] but avoidance of its spirit was quickly developed by the mushroom growth of "independent" or non-party committees through which political funds could be channeled, and by the increased financing of national campaigns by state and local committees over which Congress has doubtful legal jurisdiction. Thus Senate investigators found that at least $6,095,357.79 was spent by political committees supporting the Democratic ticket and $16,621,435.86 was spent by political committees supporting the Republican ticket in the 1940 election. In the 1944 election the corresponding figures were $7,441,799.56 for the Democratic ticket and $13,195,376.91 for the Republican ticket.

Not only has there been a failure to secure a $3,000,000 over-all limitation upon expenditures by political committees on behalf of a particular party's national ticket, but there has been a further weakening of the already weak publicity provisions of previously existing law. It is obvious, as 1944 Senate investigators pointed out, that the Hatch Act limitation "has undermined the publicity feature of Federal corrupt-practices legislation by encouraging dispersion of political fund raising and expending."[14] The official national party committees cannot afford to play fast and loose with laws governing election funds; as responsible party agencies they keep accurate records and comply reasonably well with federal publicity requirements. But the numerous "independent" and other committees have no such feeling of responsibility, frequently failing to file statements of receipts and expenditures. Even if filed, their very number and variety makes an intelligent understanding of their significance impossible without an extensive comparative analysis of all the statements. In the period of official national party committee dominance there was no such difficulty. Furthermore, dispersion had led to considerable racketeering through the preying upon contributors by "phony" political committees which use

[13] It is an ironic commentary on the limitation that the Republican National Committee officially reported receipts of $2,999,999.48 in 1944, just 52 cents less than the permitted amount. See "Green Committee Report," S. REP. 101, 79th Cong., 1st sess., at p. 79.

[14] Ibid.

the funds collected for private purposes rather than for the benefit of the party's national ticket. Thus, while ineffective in reducing materially the aggregate of political expenditures on behalf of a particular national party ticket, the ceiling limitation in the Hatch Act has proved positively harmful because of its encouragement of dispersion of collection and expenditure channels.

While statutory provisions requiring use of an official national party committee to serve as sole agent for collecting and expending political funds might be adopted in the attempt to plug the loophole in the present law, such provisions attract little legislative support. The American federal environment does not favor the sole agent device. State and local committees would protest vehemently and with some legal basis. Besides, there would still remain the problem of deciding on the size of the permissible receipts and expenditures by the sole-agent committee.

Since publicity has never really been tried, it would seem better at this time to get rid of the ceiling limitation approach entirely and try real publicity. This would avoid the evil of too low a ceiling limitation. After political expenditures had reached their natural level under the whip of public opinion guided by publicity it would be time enough to decide whether a ceiling limitation would be desirable. In the United States we too often seek to establish moral standards by law without first determining whether they are strongly backed by the community. Prohibition, though written into our time-honored Constitution, proved unenforceable for this reason. Experience with the $3,000,000 limitation in the Hatch Act once again illustrates the danger involved in adoption of legislation imposing standards of political morality where there is no apparent agreement on the part of either the politician or the public. It is well to remember the admonition of the 1944 Senate investigating committee: "Intelligent and continuous publicity will focus public attention upon the size of campaign funds and thus public opinion itself may regulate where prohibition without publicity has failed." [15]

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[15] Id. at p. 82.

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